IN THE

# Supreme Court of the United States

October Term, 1951

No. 533

WALTER H. FORTNEY, ET AL., *Petitioners*

v.

GENERAL FINANCE CORPORATION

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WALTER J. CUMMINGS
THOMAS E. CONLEY, III

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Walter H. Foster, Francis M. Bilbee and Narl W. Hedrick, on behalf of themselves and all their fellow-employees of General Motors Corporation similarly situated, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on October 17, 1951.

### Opinions Below.

The summary judgment of the District Court for the Southern District of Indiana (R. 104) was not accompanied by an opinion. The opinion of the Court of Appeals (R. 108) is reported at 191 F. 2d 907.

## Jurisdiction.

The judgment of the Court of Appeals was entered on October 17, 1951. (R. 119). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## Questions Presented.

1. Whether discrimination against reemployed veterans, by penalizing many more of them and in much greater degree than any other group because of their absence in military service, is valid under Section 8 of the Selective Training and Service Act of 1940 because it is done through collective bargaining.

2. Whether summary judgment may be entered on an affidavit containing evidence of which the credibility and probative force are necessarily in question, when no opposing affidavit is offered.

3. Whether the above statute permits veterans to be penalized in their employment on account of their absence in military service because other employees on ordinary leaves of absence are penalized in the same way.

## Statute Involved.

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S.C. Appendix 308, are as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under Section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained.
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> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ

of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year ofter such restoration.

## Statement.

This is a class action by petitioners, employees of respondent, to enforce their veterans' reemployment rights under Section 8 of the Selective Training and Service Act of 1940, as amended, 50 U. S. C. App. 308 (hereafter called "the Act.") Petitioners claim vacation pay for the year 1946. They contend respondent denied it to them in violation of the Act by adopting a vacation pay provision peculiar to that year alone, which deprived nearly every veteran returning to respondent's employ of all or a great part of his vacation pay for that year. (R. 3, 52, 58)

Beginning with 1940, respondent has had in effect a vacation pay provision adopted annually through collective bargaining with the union (UAW-CIO) representing petitioners. These provisions granted 40 hours' pay to an employee with one year's seniority, provided he worked a single day at the end of the vacation year, which was July-June. (R. 43-49, 52-53). In 1942 and thereafter, for those with five years' seniority the amount was increased to 80 hours' pay. (R. 45) In 1943, 1944 and 1945, when the workweek was increased from five to six days, the vacation pay was raised correspondingly, from 40 and 80 hours to 48 and 96 hours (R. 46-48); it was decreased when the workweek dropped back to 40 hours in 1946. (R. 52) In substance, the provision was for one or two weeks' vacation pay for those with the appropriate seniority. Such provision has continued in effect unbrokenly to the present time—*except for 1946*, the year in dispute. (R. 43-49, 53-54) From time to time additions were made to this basic provision, and these additions in turn were modified or revoked, as shifting production or labor conditions seemed to require. (R. 45, 46, 47, 48, 53) Sometimes these additions or modifications were made through collective bargaining (R. 47, 53); sometimes they were imposed on respondent and the union by the War Labor Board (R. 45, 46, 48); but through it all, the basic provision remained unchanged: one week's pay for an employee with one year's seniority and two weeks' pay for an employee with five, provided he worked one day at the end of the vacation year.

Petitioners have the seniority needed to qualify for vacation pay; they have also met the requirement that they actually be at work one day at the end of the year, i. e. they worked during the last pay period in June, 1946. (R. 2, 6, 37) The class in whose behalf this action is brought are those veteran employees of respondent governed by the 1946 collective bargaining agreement here in issue who (a) returned to its employ between July 1, 1945 and June 30, 1946, (b) had one or more years' seniority on the latter

date, (c) worked at least part of the last pay period beginning in June, 1946, and (d) are entitled to reemployment in accordance with the provisions of Section 8 of the Act. (R. 1-3)

For 1946 (the vacation year July 1945—June 1946) the basic provision described above was revised. Instead of "40 (or 80) hours' pay," respondent and the union agreed that the amount of vacation pay should be "2% (or 4½%) of the employee's earnings in calendar 1945." (R. 52) The mass demobilization of our wartime army occurred, of course, in the period October 1945—May 1946, and the vast majority of respondent's veteran employees returned to respondent's employ very late in 1945 or in the first half of 1946. Because of this change in the method of computing 1946 vacation pay, in the words of the complaint "nearly every veteran returning to General Motors' employ was deprived of vacation pay in 1946 because of his prior absence in military service" (R. 3), for he had little or no 1945 earnings from which to figure 1946 vacation pay. The complaint charged that veterans were made "the victims of a unique rule discriminating against employees in the military service." (R. 3)

In 1947 and subsequent years, the former vacation provision was reinstated. (R. 3, 53)

Petitioners began discovery by serving interrogatories to procure evidence of the discriminatory operation and effects of the 1946 provision upon returning veterans. (R. 10-14) Respondent objected to the interrogatories on grounds of burdensomeness and irrelevance. (R. 15-20). Before a ruling on its objections, respondent moved for summary judgment. (R. 36)

To support its motion, respondent submitted two affidavits, one by Hoffman and one by Seaton. (R. 36, 39). Of the evidence in the affidavits, the only controversy here concerns paragraphs 31-40 of Seaton's affidavit, in which he describes the collective bargaining negotiations leading to adoption of the 1946 provision. (R. 49-52). The gist of

Seaton's evidence on this matter is that respondent's employees were on strike from November 21, 1945 to March 13, 1946, that in order to reduce vacation pay proportionately to the time lost in the strike respondent proposed that the amount of vacation pay be based on the employee's earnings during the vacation (fiscal) year, and that upon union insistence calendar year earnings were adopted as the base to lessen this reduction in vacation pay.[1]

Petitioners opposed decision of the discrimination issue by summary judgment, on two grounds. First; respondent's showing that the 1946 provision was agreed upon through collective bargaining did not rebut petitioners' allegation that in its effects and operation the provision discriminated against returning veterans. (R. 70, 76-79) Second: as an explanation that the provision was in no way directed against veterans, the credibility and probative force of arguments and reasons advanced in bargaining sessions are necessarily

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[1] From this evidence of respondent, it is clear that the 1946 vacation pay was not compensation for work in 1945, but as in all other years was simply an advantage accruing to an employee on account of his seniority. On this record, no issue is presented on this point. The sole evidence thus far is that the only actual work required at any time was one day at the end of the vacation year, and that the "percentage of earnings" clause was merely a method of computation to reduce 1946 vacation pay proportionately to the amount of time lost during the strike. So the court below considered it, and respondent did not argue otherwise.

Should respondent contend that the singular 1946 provision made vacation pay compensation for work in 1945, or that the provision imposed a requirement of work in 1945, it would face something of a dilemma. Paying twice for or requiring work in a period when most veterans were absent (January — June 1945, as to which the 1945 vacation had already been granted), and paying not at all for a corresponding period when they were present or ignoring the work they performed in the vacation year, (January — June, 1946), would clearly reveal the discriminatory intent as well as effect of the 1946 provision. That the union thought 1946 vacation pay was divorced from any specific amount of work may explain its failure to demand a special provision protecting veterans; for under such view, the veterans should under the contract have been given constructive earnings for 1945 equal to that of the average employee in their wage rates.

in question, regardless of how accurately the bargaining is described; thus they cannot form a basis for summary judgment. (R. 76-79) Petitioners also contended that the "escalator" interpretation of the Act entitled them to vacation pay equal to that received by their fellow employees who remained continuously in their civilian employ, and that summary judgment should be rendered in their favor. (R. 72). The District Court entered summary judgment for respondent without opinion (R. 104) and the Court of Appeals affirmed. (R. 119)

Concerning the first ground, the Court of Appeals held that no discriminatory operation or effect of the provision could exist in the light of Seaton's description of the bargaining through which the 1946 provision was agreed upon. As the Court said, this evidence "completely annihilates plaintiff's contention that such agreement was made in bad faith or that it was discriminatory" (R. 115-116), and allegations of the discriminatory operation and effects of the provision "raise no genuine issue as to a material fact." (R. 118) The decision thus is that the statute does not prevent discriminatory action against veterans, so long as it is done through collective bargaining and the discrimination does not appear overtly in the negotiations or the language of the agreement.

Concerning the second ground, the Court of Appeals held petitioners could not object to the credibility and probative force of the arguments made in the bargaining sessions as proof of the genuine reasons for adoption of the 1946 provision. To justify this conclusion, the court stated that "as to what took place in the bargaining negotiations," "the union as bargaining agent for the employees, including the plaintiffs, presumably had the same information on this score as did the defendant." (R. 117) Furthermore, the court held, petitioners were precluded from this objection by the absence of affidavits from them stating they had no personal knowledge of the facts proving discrimination. (R. 117)

The court rejected the "escalator" interpretation of the Act on authority of decisions of other courts of appeals that the Act is satisfied if veterans are accorded the same treatment given non-veterans on leaves of absence. (R. 111-112). It held that "vacation pay is not a right guaranteed to the returning veteran by the Act." (R. 114).

**Reasons for Granting the Writ**

This case presents two questions under the reemployment provisions of selective service legislation which are of general and continuing importance. As the draft laws were continued through and beyond the end of the war, down to the present and into the future, the reemployment provisions were retained and their protection scrupulously extended to all of those whose military obligations might impair their positions of employment.[2] International obligations on a world-wide scale will, of necessity, require a large and steady flow of persons from civilian employment into the armed forces and back again. Whether the Act protects absent veterans against discrimination through collective bargaining, and whether on account of their absence they may be penalized in the terms and conditions of their employment because those on ordinary leaves of absence are penalized, are issues of grave and general concern. Those concerned in this action are veterans of the

[2] Service Extension Act of 1941 as amended, Section 7, 55 Stat. 627, 50 U. S. C. App. § 357, preserving and continuing reemployment rights for all those entering service, and extending the rights to members of the Women's Army Corps; Selective Service Act of 1948, Section 9, 62 Stat. 604, 50 U. S. C. App. § 459, continuing reemployment rights for all those entering the armed services after its enactment and relaxing qualification standards for disabled veterans; Universal Military Training and Service Act (1951), Section 1(s), 65 Stat. 86, 50 U. S. C. Supp. IV, App. § 459, raising the limits on periods of military service beyond which reemployment rights are barred, and extending protection to those who leave their jobs but are rejected by the armed forces, and to those who perform only military training duty instead of active service.

second world war who have already returned to civilian life and now find their military service has opened them to permanent disadvantage compared to other employees.[3] But those presently serving in or returning from Korea and elsewhere are equally concerned. And the answer to these questions will seriously affect the morale and decision of those entering or contemplating entry into the military service, now and in the future. From the employer's point of view, the issues here are of almost equal importance. Vacation pay provisions are widely prevalent in collective bargaining agreements and employers' policies, as are pension programs, insurance participation and the like. Employers' costs and competition over the country are directly affected.

The question whether summary judgment may be granted on evidence in an affidavit of which the credibility and probative force are necessarily in issue raises a substantial point of due process, on which decisions of other courts of appeals conflict with the decision below.

1. Petitioners believe that the discrimination lay in the way the 1946 change in the vacation pay provision penalized them more and penalized more of them because of their absence in military service than any other group of employees, and in the way it operated to cast upon petitioners all or nearly all the burden of reduction in vacation pay on account of the strike. Thus in their complaint they alleged that "nearly every veteran returning to General Motors' employ was deprived of vacation pay in 1946 because of his prior absence in military service" and that they were made "the victims of a unique rule discriminating against employees in the mili-

[3] 50,000 out of 250,000 hourly-paid employees of respondent are represented in this action, according to respondent's own estimate in a previous suit (dismissed by stipulation) by one of the veterans to recover this vacation pay. *Horace E. Neal* v. *General Motors Corporation*, Civil No. 6053, E. D. Mich., Southern Div.; petition of intervenor UAW-CIO, par. 7, p. 2; answer of defendant, par. 7, p. 5.

tary service." (R. 3) To sustain their contention, petitioners sought to obtain and introduce evidence showing how respondent's original proposal of fiscal year earnings as a base for vacation pay would have reduced the pay over twice as much for veterans as for other employees and out of all proportion to the time lost in the strike, how the calendar year earnings base exaggerated this discrepancy by depriving nearly every veteran of the small amount of vacation pay left him under the fiscal year base at the same time it restored to other employees most or all of the reduction, and how it was likely respondent knew these effects would occur.[4] (R. 10-14, 31-34)

Respondent showed through Seaton's affidavit (R. 49-52) that the 1946 provision resulted from collective bargaining,

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[4] A bit of arithmetic will make it clear that petitioners' contentions were more than the "surmise, suspicion and conjecture" which the court below termed them. (R. 116)

The strike lasted 113 days, or .....31% of the year
41 days of it were in 1945, or ....36%

Under respondent's "fiscal year earnings" proposal:

Non-veterans (80% of employees; see note 3) lose 31% of normal pay or .....25% of respondent's total cost.

Veterans (20% of employees) lose 70% of normal pay (very few could have returned to work between V-J day and the beginning of the strike, and only 30% of the year remained after the strike) or.....14% of respondent's total cost.

(thus respondent proposed to save itself 39% of its total vacation pay cost, as against 31% of theyear covered by the strike, the additional 8% coming out of the vacation pay of the one-fifth returning from military service.)

Under the "calendar 1945 earnings" proposal:

Non-veterans lose only 36% of what they lost under fiscal year earnings method, or 9% of respondent's total cost; but this loss is offset by the increases from 2% to 3% of earnings for three-year employees (a 50% increase) and 4% to 4½% for the five-year employees (a 12½% increase), so that the figure is considerably less than 9%, say a maximum of .....6% of respondent's total cost.

Veterans lose practically all they had left, or .....6% of respondent's total cost.

and that in the arguments advanced by each side at the bargaining sessions the adverse effects on the veterans did not figure as a reason for adoption of the provision. This evidence, of course, did not refute or even relate to petitioners' contentions. Petitioners contend that the Act prevents the reduction from being made in a manner which casts a disproportionate share of the burden on them, regardless of the arguments in bargaining and the seemingly even-handed language of the provision. If the evidence showing the existence of such a burden is not material, as the court below held in affirming the summary judgment for respondent, then the Act gives the veterans only the protection which the parties to collective bargaining voluntarily accord them. The veterans may be injured in any way and to any extent, so long as it is done via collective bargaining and the injury is not mentioned overtly in the negotiations or in the language of the agreement.

Such a view of the Act seems erroneous. It reduces to inanity the observations of this Court in *Fishgold* v. *Sullivan Drydock Corp.*, 328 U. S. 275, 285, that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act," and in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 57, that "It is therefore clear that Congress did not confer the rights given as an incident of restoration simply to leave the employer free to nullify them at will, once he made it." And in relying on *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521 to support its conclusion, the court below plainly disregarded the warning therein (p. 529) that the Act prohibits "devices of hostility to veterans." The decisive fact there was not that the veteran's loss of ground stemmed from a provision adopted in collective bargaining, but rather was that the veteran would have been in precisely the same position had he never left his job for military service. Thus on this point the decision below is inconsistent with this Court's interpretation of the Act. The basic problem is whether

the Act has an effective meaning in the large field of employment subject to collective bargaining, an issue of such general importance that this Court should resolve it.

2. Even if evidence concerning the undue harshness of the 1946 provision toward petitioners were material, the court below held, Seaton's affidavit describing the arguments of the union and respondent in negotiating the provision "completely annihilates plaintiff's contention that such agreement was discriminatory as to plaintiffs." (R. 115-116). The summary judgment against them was therefore proper, for the allegation of discrimination "finds no factual support in the record" (R. 116) because petitioners filed no controverting affidavits (R. 117). The court below thus accepted the arguments and reasons urged in the bargaining sessions as the genuine and only reasons for adoption of the provision.

The credibility and probative force of this evidence are necessarily in question, for its acceptance turns on the knowledge, accuracy and sincerity of those doing the bargaining. Collective bargaining negotiations are a process closely akin to horse trading, in which proposals and supporting reasons are advanced to convince the other party rather than to display one's own considerations. The reliability of the arguments is thus inherently suspect. Such evidence does not show that there is "no genuine issue as to material facts," as it must under Rule 56, Federal Rules of Civil Procedure. It is only evidence about material facts.

Petitioners' lack of personal knowledge of the evidence concerning discrimination, their consequent inability to present affidavits controverting Seaton, and the absence of affidavits under Rule 56(f) stating this inability, obvious from their positions as production workers in respondent's plants, do nothing to eliminate the dispute about material facts. The evidence on this issue is largely in the possession of respondent, in its employment and financial records

and in the recollections of its officials.[5] Petitioners had commenced discovery of this evidence and had explained in detail what they expected to prove by it. (R. 26-34) If it is possible this evidence would be material to the existence of discrimination, the summary judgment is inconsistent with views of this Court because it is not yet "quite clear what the truth is." *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 627 (1947). The affirmance of summary judgment in these circumstances also conflicts squarely with decisions of two other courts of appeals: *Arnstein* v. *Porter*, 154 F. 2d 464 (C. A. 2, 1946); *Colby* v. *Klune*, 178 F. 2d 872 (C. A. 2, 1949); *Farrell* v. *District of Columbia Amateur Athletic Union*, 153 F. 2d 64 (C. A. D. C. 1946); *Garrett Biblical Institute* v. *American University*, 163 F. 2d 265 (C. A. D. C., 1947).

The posture of each of these cases was identical to that of the present one except the credibility here lies one step farther back, in that we are concerned with the accuracy of the statements the affiant says were made in the negotiations rather than whether they were made. In each case, summary judgment was denied. The rule governing them is stated thus in *Colby* v. *Klune*, 178 F. 2d at 873-874:

> The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and—absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor. As we observed in Arnstein v. Porter, 2 Cir., 154 F. 2d 464, 471: "It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has of-

[5] The court below asserted this argument was not open to petitioners because "as to what took place during the bargaining negotiations," "the union, as the bargaining agent for the employees, including the plaintiffs, persumably had the same information on this score as did defendant." (R. 117). The court seems to have mistaken petitioners' questioning of the credibility of Seaton's evidence for an attack on his veracity.

> fered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true." For the credibility of the persons who here made the affidavits is to be tested when they testify at a trial. Particularly where, as here, the facts are peculiarly in the knowledge of defendants or their witnesses, should the plaintiff have the opportunity to impeach them at a trial; and their demeanor may be the most effective impeachment.

*Piantadosi* v. *Loew's, Inc.* 137 F. 2d 534 (C. A. 9, 1943), a decision essentially the same as that below and one of respondent's authorities there, was expressly repudiated in favor of the above rule in the *Garrett* case with the comment, "this is so elementary that we decline to follow authority to the contrary in other jurisdictions." 163 F. 2d at 267. The decision below is therefore flatly contrary to these cases. Moreover, that decision represents a serious abuse of summary judgment procedure, amounting to a denial of due process and requiring correction by this Court.

3. The court below held, in mistaken reliance on *Aeronautical Industrial Lodge* v. *Campbell,* 337 U. S. 521 (1949), that the Act did not prevent returning veterans from being penalized in their employment on account of their absence in military service, so long as other employees on non-military leaves of absence are penalized in the same manner.

Such conclusion conflicts with repeated holdings of this Court that the returning veteran is entitled to be restored to the position he would have occupied had he kept his position continuously during the war, so that he does not lose ground by reason of his absence. This interpretation was first announced by this Court in *Fishgold* v. *Sullivan Drydock Corp.,* 328 U. S. 275, 284-286 (1946), in a case involving proper order of layoff. It was reaffirmed each time the Court later considered the Act, in two layoff cases, *Trailmobile Co.* v. *Whirls,* 331 U. S. 40 (1947) and *Aeronautical Industrial Lodge* v. *Campbell,* 337 U. S. 521 (1949),

in a case involving promotion, *Haynes* v. *Cincinnati, N. O. & T. P. Ry.*, 338 U. S. 278 (1949), and in a case involving the right to transfer to a different shop, *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278 (1949). This principle the Court has succinctly analogized to an "escalator" upon which the veteran steps back after military service at the point it has then reached, upward or downward. In its most recent explanation of this principle, the Court has said:

> "An honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment." *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, 283 (1949)

Congress has specifically endorsed this escalator principle as the proper construction of the Act. The statutory provisions here involved were reenacted in 1948 with the addition of an explanatory provision that the veteran should be restored so as "to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously." This was considered merely to express what that statute previously meant.[6]

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[6] Selective Service Act of 1948, 62 Stat. 604, 50 U. S. C. App. §459(c) (2), renamed the "Universal Military Training and Service Act" in 1951. The provision was added by the Senate Armed Services Committee. "The Committee has taken the position that as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation which would contravene or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 Act. For that reason no important substantive changes have been made in the provisions of the 1940 Act." SEN. REP. No. 1268, 80th Cong., 2d Sess., p. 15 (1948). In commenting specifically upon the new section, the Sen-

Moreover, when Congress thought it appropriate in the case of those not performing extended active military service to limit reemployment rights to the terms and conditions accorded those on ordinary leaves of absence, it so stated in clear and unmistakable terms quite unlike those in the statute before us. For in broadening the protection of the reemployment statute in 1951, Congress provided that a person rejected by the armed forces or one taking training duty "shall be granted a leave of absence by his employer" and nothing more. Universal Military Training and Service Act, Section 9(g)(3), 65 Stat. 86, 50 U. S. C. Supp. IV, App. 459 (g)(3). The decision below is thus at odds with the express views and purposes of Congress, as well as contrary to decisions of this Court.

Among the lower courts there is a widespread conflict between the escalator principle and the leave of absence theory asserted by the court below. The leave of absence theory seems to have appeared first in *Raulins* v. *Memphis Union Station*, 168 F. 2d 466 (C. A. 6, 1948), in which promotions and seniority were the issue. It was reaffirmed quite recently in a seniority case, *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6, 1951). On the other hand, the "escalator" principle was followed in another seniority case similar in all material respects. *Morris* v. *Chesapeake & O. Ry.*, 171 F. 2d 579 (C. A. 7, 1948). Where absence in military service caused the veteran to miss opportunities for transfer to a different type or location of work, the leave of absence theory has been applied against him in *Oakley* v. *Louisville & N. R. Co.* 20 Labor Cases (Commerce Clearing House) Par. 66, 132 (E. D. Ky., January 16, 1951), following the remand by this Court, and in identical circumstances the escalator

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ate Committee added: "Statement of policy regarding application of the 'escalator principle': the provisions of this legislation differ from those contained in the Selective Training and Service Act of 1940, as amended, in that [this] is specifically stated to be the intent of Congress." Id. at 16.

principle has been applied in his favor in *Conner* v. *Pennsylvania R. R.*, 177 F. 2d 854 (C. A. D. C. 1949), cert. den. 339 U. S. 919 (1950). As to vacation pay, the leave of absence theory governed in *Brown* v. *Watt Car & Wheel Co.*, 182 F. 2d 570 (C. A. 6, 1950); cert den. 340 U. S. 875 (1950); the escalator rule controlled in *Mentzel* v. *Diamond*, 167 F. 2d 299 (C. A. 3, 1948), only be abandoned for the leave of absence theory in a suit by a member of the petitioning class here, *Dougherty* v. *General Motors Corp.*, 176 F. 2d 561 (C. A. 3, 1949), cert. den. 338 U. S. 956 (1950). The escalator principle was held to override contractual requirements that the employee forfeit seniority if he resigned, where he resigned to enter military service, *Rudisill* v. *Chesapeake & O. Ry. Co.*, 167 F. 2d 175 (C. A. 4, 1948), and that he be "on the Company's rolls" on December 31 in order to qualify for vacation pay, *MacLaughlin* v. *Union Switch & Signal Co.*, 166 F. 2d 46 (C. A. 3, 1948). In contrast, under the leave of absence theory a contractual provision that time on leave of absence could not be credited toward severance pay was held valid as applied to military service. *Seattle Star* v. *Randolph*, 168 F. 2d 274 (C. A. 9, 1948). In cases in which military service prevented completion of probationary employment and consequent acquisition of seniority, the escalator rule was applied in the earlier and ignored in the later. *Payne* v. *Wright Aeronautical Corp.*, 162 F. 2d 549, 551-552 (C. A. 3, 1947); *Lesher* v. *P. R. Mallory Co.*, 166 F. 2d 983 (C. A. 7, 1948).[7]

[7] The lower courts cite the precedents on promotion, job choice, vacation pay, severance pay, etc. interchangeably so that no distinction can be drawn between these rights. As the court below observed (R. 111): "Other courts have taken the same view, both as to vacation pay and as to other matters embodied in agreements between the union and the employer." See, e.g. *Brown* v. *Watt Car & Wheel Co.*, 182 F. 2d 570 (C. A. 6, 1950) cert. den. 340 U. S. 875 (1950), a vacation pay decision applying the leave of absence rule on authority of a promotion case, *Nevins* v. *Curtiss Wright Corp.*, 172 F. 2d 535 (C. A. 6, 1949); and *Mentzel* v. *Diamond*, 167 F. 2d 299 (C. A. 3, 1948), a vacation pay decision following the escalator rule on authority of a seniority case, *Gauweiler* v. *Elastic Stop-Nut Co.*, 162 F. 2d 448 (C. A. 3, 1947).

Factual differences in these cases do not justify the differences in result. In the *Raulins* and *Gregory* cases, an alternative ground of decision was that the promotion or seniority must accrue automatically by virtue of a contract provision if the Act is to protect it, and that evidence showing the individual veteran would by custom, practice or in fact have received the promotion was immaterial; but in the *Morris* case, a similar or greater uncertainty existed, for only the chance to take an examination was certain, passage was required for promotion and the record shows many failed. In the *Oakley* and *Conner* cases, the circumstances were identical in that the employee was required to elect the transfer before being given the opportunity; Oakley's case was, if anything, slightly stronger than Conner's, for Conner had to show qualification for transfer and Oakley did not. In all these cases, as here, there was a work requirement of one day on the job in order to qualify for the emolument, i.e. seniority there dated from the first day of work. In the *Brown, Mentzel,* and *Randolph* cases, the contract provisions were almost identical, being "continuously in its employ for a period of one (or five) years," "one (or five) years' service," and "total years of full time continuous employment," respectively, and none of the decisions involved an interpretation of the contract. Likewise, the *Payne* and *Lesher* contract provisions were the same and the courts considered their meaning to be the same.[8] Where the leave of absence theory was applied the veterans lost ground every time because of their absence in military service, in the same

[8] The *Dougherty* and *MacLaughlin* cases may have been influenced by the view the courts took of the meaning of the contractual provisions. Cases such as *Siaskewicz* v. *General Electric Co.*, 166 F. 2d 463 (C. A. 2, 1948) and *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (C. A. 2, 1948) are not pertinent here; they arose under contracts interpreted definitely to require a given amount of actual work to qualify for the benefit, a requirement which, insofar as it was imposed by the 1946 provision, petitioners have met by being at work in the last pay period in June, 1946.

circumstances in which the escalator principle was applied to prevent such loss.

The leave of absence theory and the escalator principle cannot be reconciled. The former permits the veteran to be denied advantages and to be outstripped by his fellows solely because of his absence in military service, not only in one year but in any or all years. The latter assures him that this shall not happen. The former leaves the employer free to determine the veteran's protection by formulating the rules applicable to those on leave of absence.[9] The latter declares that the movement of the escalator cannot be halted or deflected by action of the employer, that the statutory protection cannot be eliminated by collective bargaining agreement.[10]

Resolution of this conflict will determine the reach of the statute itself, governing a field which has received the con-

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[9] Should this petition be granted, petitioners will urge as they did below that if the leave of absence theory is correct, it too entitles them to 1946 vacation pay. Section 8(c) of the Act requires that petitioners "be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted." Under this clause, petitioners are entitled to have their 1946 vacation pay computed as if the vacation pay provisions in effect when they were inducted were also in effect in 1946. The provisions for the earlier years would give 40 or 80 hours' pay to employees on ordinary leave of absence for the same portion of the vacation year as petitioners were in military service in the 1946 vacation year.

[10] The escalator principle does not, of course confer any right to pay, vacations or other advantages during the time the veteran is in military service. The question is rather, what rate of benefits, what level of treatment, shall in the future be accorded him after his return.

Further, the principle of itself creates none of the terms or conditions of employment as to which the escalator operates. These must be established independently of the Act, by employer policy, practice or, as here, by collective bargaining agreement. But once they are so established for other employees, the escalator prevents their loss or impairment on account of absence in military service.

Likewise, the principle does not exempt petitioners from reduction of their vacation pay on acount of the strike, to the same extent as reduction was made for other employees.

tinued attention of Congress. Since the statute provides no administrative determination which might tend to still the discord, judicial action becomes essential.[11] The issue is wider than vacation pay; but even as to that problem, the outcome will have a direct and large significance to a great proportion of employers throughout the country and to all of their employees who may be liable for military service.[12] According to two recent surveys made for the information and guidance of employers, vacation pay for those performing military service has been expressly embodied in 85%, and 205 out of 212, respectively of the col-

[11] The widespread effect of this statute appears in the litigation of over 400 cases in the courts since the first suit occurred in 1944. Annual Report of Secretary of Labor, 1950, p. 77. The continuing impact of the Act's protection, or lack of it, is shown in repeated efforts to obtain decision from this Court on issues which veterans, employers, or both consider of general importance. Since the *Oakley* decision, ten petitions for certiorari have been filed in seven cases. The Secretary of Labor, responsible under Section 8(g) of the Act, and P. L. 26, 80th Cong., 61 Stat. 21, for aiding veterans to obtain reemployment rights, observed in his report (p. 78):

> Many other issues, however, equally as important [as this Court's *Oakley* decision], are still undetermined and await further litigation. Among these are the veteran's rights to promotions, to vacation pay, and to protection of his pension rights.
>
> Since the end of hositilities in Europe there has been a tremendous rise in private pension plans. Since that time, too, the labor force within an industry generally has acquired greater seniority than that possessed at the outbreak of World War II. Both factors tend to increase the importance of the right to return to the position left for military service, and in the future an even greater percentage of veterans can be expected to claim the benefits of the statutes than in the past. Indeed, with the outbreak of hostilities in Korea, there was an immediate manifestation of interest by persons likely to be called into military service concerning their right to return to their civilian employment. Even before entrances into military service increased substantially, the volume of work in [this field] rose 10 percent.

[12] 800,000 will be released and replaced annually (in peacetime; casualties excluded) at the stable military strength of 3½ million recommended by the Department of Defense, said Secretary Marshall. Hearings on H. R. 1752, House Committee on Armed

lective bargaining agreements or employer policies examined. Bureau of National Affairs Special Survey, *"Military Leave Policies of 500 Corporations,"* (October 1950) p. 7-8, 13, 16; National Industrial Conference Board, Studies in Personnel Policy, No. 114, *"Company Military Leave Policies"* (1951) pp. 23-25.[13] As would be expected, these provisions reflect very specifically the existing conflict among lower courts over the escalator principle as against the leave of absence theory.

If the escalator principle is still the meaning of the Act, this Court should so declare and insist upon its observance by lower courts. If the principle is to be discarded, the veterans should be told so, that they may seek through legislation to make effective the mandate of Congress that they be restored "to such status as they would have enjoyed if they had continued in such employment continuously."

## Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Services, 82d Cong., 2d Sess., p. 17 (1951). In his State of the Union message on January 9, 1952, the President said the Armed Forces now total "nearly three and one-half million." 98 Cong. Rec., January 9, 1952, at p. 30.

[13] An immediate and closely-related example of the way this issue may affect future years is respondent's own pension agreement dated May 29, 1950, with the same union, and covering the same employees as the vacation pay provision. Article III, section 1(b), p. 25, provides "that if there was an interval equal to two years or more between periods of employment * * * no service prior to such interval shall be counted" toward the length of employment needed to qualify for a pension. The extent to which two years of military service might cause employees to lose pension credits for prior employment is identical to the question in the present case.